***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# NO.76-6159

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA
and
RUTH SEMKO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



REPLY BRIEF FOR THE DEFENDANT-APPELLANT
UNITED STATES OF AMERICA

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IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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# REPLY BRIEF FOR THE DEFENDANT-APPELLANT UNITED STATES OF AMERICA

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In our main brief we demonstrated that the district court lacked jurisdiction over this case due to the plaintiffs' failure to file a timely administrative claim as required by the Federal Tort Claims Act, 28 U.S.C. 2401(b) and 28 U.S.C. 2675(a). The plaintiffs do not deny in this Court that they failed to file a timely administrative claim. Their failure to do so was an absolute bar to the present action. See United States v. Sherwood, 312 U.S. 584 (1941); Meeker v. United States,

435 F. 2d 1219 (C.A. 8, 1970); Bialowas v. United States, 443 F. 2d 1047 (C.A. 3, 1971); Avril v. United States, 461 F. 2d 1090 (C.A. 9, 1972); Melo v. United States, 505 F. 2d 1926 (C.A. 8, 1974). Thus the district court's judgment for $65,000 in their favor must be reversed.[1/]

Plaintiffs raise three arguments in their brief which we discuss seriatim below:

In Point I plaintiffs assert that the United States has accepted liability for the negligence of its employee, Francis Hunt, not only with respect to his operation of a motor vehicle in the course of his employment but also with respect to his failure to comply with the procedural requirements of 28 U.S.C. 2679(c), relating to the removal of federal driver cases from state to federal courts (Brief, pp. 11-13). Plaintiffs maintain, in effect, that if they cannot recover for the original negligent act of Francis Hunt by reason of their failure to file a timely administrative claim, then they are entitled to recover the $65,000 in damages awarded by Judge Port on the basis of "the negligent failure of Francis Hunt to deliver to his superiors the Summons and Complaint in this matter served on him on or about May 13, 1977" (Id. at p. 12).

There are several obvious flaws in this argument: First, this theory of negligence was not set out in the

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1/ See also the recent decision of the United States District Court for the Eastern District of New York, Salvatore LaRose v. Aimo W. Hill (United States of America), No. 76-C-1080, decided December 21, 1976, which is reproduced in the Addendum to this brief.

plaintiffs' complaint nor otherwise raised in the district court and cannot be raised for the first time in this Court. See McGoldrick v. Compagnie Genarale, 309 U.S. 430 (1939); Garcia v. American Marine Corp., 432 F. 2d 6 (C.A. 5, 1970); United States v. Moore, 444 F. 2d 475 (C.A. 4, 1971).

Second, the administrative claim requirement of 28 U.S.C. 2675(a) applies to all Federal Tort Claims Act suits, nor merely to federal driver cases. Thus plaintiffs cannot avoid the jurisdictional bar of the administrative claim requirement by shifting to an alternate allegation of injury for which no claim has been filed.

Third, the theory now advanced by the plaintiffs has no merit in any event. Section 2679(c) establishes no duty owed by the government employee, Mr. Hunt, for the breach of which the United States would be liable to the plaintiffs in damages but is merely prccedural. The section provides that a government employee in order to avoid personal liability for negligent acts committed while driving a motor vehicle in the scope of his employment must notify his agency of any suit brought against him in a state court. The agency, in turn will notify the Attorney General, who will certify that the employee was acting in the scope of his employment and take steps to have the case removed to a federal district court where the action will proceed as one against the United States. See Section 2679(d). The omission by the employee to

report pending state court proceedings does not give rise to a cause of action by a third party against the United States; it merely leaves the employee to defend himself in the state court action.

Fourth, this alternate theory of government liability turns on the false assumption that Mr. Hunt's failure to deliver the summons and complaint promptly to his superiors was the proximate cause of plaintiffs' failure to file an administrative claim within the statutory two year period of limitation imposed by 28 U.S.C. 2401(b) and their loss of $65,000 in damages (Brief, p. 12). This is not so because, as we demonstrated in our main brief (p. 18), plaintiffs had ample opportunity to file a timely administrative claim after they learned at Mr. Hunt's pre-trial examination on March 5, 1974, that he was employed as a meat inspector for the Department of Agriculture and was returning home to Binghamton, New York from a work assignment in Friendsville, Pennsylvania when the accident which gave rise to this civil action occurred on November 8, 1972. Plaintiffs now admit to having this knowledge which should have indicated to them that Mr. Hunt was probably acting in his scope of employment in which case the proper party defendant was the United States[2/] (Brief, pp. 3, 31-32). In view of these admissions, plaintiffs cannot rely

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2/ We note here that the plaintiffs did not subsequently challenge the Attorney General's certification that Mr. Hunt was acting in the scope of his employment, nor did they try to prevent the removal of the case to the federal court. Thus they apparently agreed that under the circumstances in question Mr. Hunt was acting in the scope of his employment.

here upon Judge MacMahon's finding that the plaintiffs "had no indication that Hunt was a government employee acting within the scope of his employment" (Appendix, p. 95). This finding is contrary to the evidence.

In Point II (pp. 13-15) plaintiffs contend that the district court had jurisdiction over the co-defendant Ruth Semko and her cross claim against Mr. Hunt and the United States which is not subject to Section 2675, and that the judgment should not be reversed because of the joint and several liability of the parties. However, since the court lacked jurisdiction of the principal claim under the Federal Tort Claims Act, due to plaintiffs' failure to file an administrative claim, it plainly also lacked jurisdiction over the cross claim.[3/] Therefore the district court should have dismissed all claims against the government and remanded plaintiffs' claim against Mrs. Semko to the state court. See Smith v. Randall, 393 F. Supp. 1320 (D. Md., 1974); Whealton v. United States, 271 F. Supp. 770 (E.D. Va., 1967).

The plaintiffs mistakenly rely upon Rosario v. American Export-Isbrandtsen Lines, Inc., 395 F. Supp. 1192 (E.D. Pa., 1975). There the district court held that where a seaman sued a shipowner under the Jones Act and the shipowner joined the United States as a third party defendant, the seaman was not required to file an administrative claim with the appropriate agency before asserting his claim against the United States under the Tort Claims Act. The Third Circuit reversed in Rosario v. American

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3/ Moreover, no independent basis for federal jurisdiction of a direct claim between the plaintiffs and Mrs. Semko, such as diversity of citizenship, appears on the face of the complaint. The complaint asserts that both Francis Hunt and Mrs. Semko reside in the County of Broome and State of New York (A. 4).

Export-Isbrandtsen Lines, Inc., 531 F. 2d 1227 (1976), certiorari denied, ___ U.S. ___ (No. 76-16, 45 L.W. 3253, October 5, 1976) for the plaintiff seaman's failure to file an administrative claim. The court of appeals stated (531 F. 2d at 1233-1234):

> Our conclusion that appellee was required to file an administrative claim is buttressed by a consideration of the policies underlying section 2675(a) and the purpose behind the statutory exception for third-party complaints. Section 2675(a) was enacted in 1966 to improve and expedite the disposition of tort claims against the government by establishing a system of prelitigation administrative consideration and settlement of claims, thereby reducing court congestion and eliminating unnecessary litigation. . . . To permit appellee to maintain this action against the United States would undermine the important policy in favor of prelitigation administrative review and possible settlements expressed in section 2675(a). Appellee would be able to do indirectly that which he could clearly not do directly.
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> * * * * *
>
> Appellee's final argument in support of jurisdiction is an equitable one. He asserts that since there is already an existing lawsuit in which the United States is a party, we should allow him to maintain his claim against the government. This contention need not detain us long. The simple answer is that section 2675(a) is a jurisdictional prerequisite to suit under the Federal Tort Claims Act and cannot be waived.

Thus Rosario clearly supports our position on this appeal.

In Point III plaintiffs assert that since the government did not apply to this Court for permission to take an interlocutory appeal from Judge MacMahon's order,[4/] and has thus far challenged only Judge MacMahon's decision rather than Judge Port's decision, Judge Port's findings stand unchallenged and his decision cannot be reversed on this appeal (pp. 15-16). This is sheer nonsense. We have challenged Judge Port's final judgment (A. 99) on the legal ground that the district court had no jurisdiction over this action. No challenge to Judge Port's factual findings and conclusions is necessary for reversal because of the fundamental error of law. Moreover, plaintiffs do not dispute that this appeal from the final judgment brings up all interlocutory rulings affecting the rights of the parties, including Judge MacMahon's denial of our motion to dismiss, which was tacitly affirmed by Judge Port in entering judgment for the plaintiffs.

Since no transcript of Judge Port's bench ruling was included in the record on appeal when we filed our brief, it is true that we have thus far focused on Judge MacMahon's decision. However, now that the plaintiffs have incorporated a transcript of Judge Port's oral decision in their

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4/ Plaintiffs suggest that our decision not to seek an interlocutory appeal upon Judge MacMahon's certification was based upon "unimpressive reasons" (Brief, p. 15). We disagree. 28 U.S.C. 1292(b) was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful deaths that can be tried or disposed of on their merits in a few days. Kraus v. Board of County Road Commissioners, 364 F. 2d 919 (C.A. 6, 1966); Cardwell v. Chesapeake & Ohio Railway Co., 504 F. 2d 444 (C.A. 6, 1974); Milbert v. Bison Laboratories, 260 F. 2d 431 (C.A. 3, 1958).

brief (pp. 35-45) we will also consider his observations on the jurisdictional aspects of the case.

Judge Port observed:

> There were practically no legal problems in connection with the case. It was a garden variety automobile pedestrian negligence action. The only legal problem that I can see in the case is the one that was disposed of by Judge MacMahon. Having reviewed the matter, I am prepared now to and will dictate my findings of fact and conclusions on the record. [Plaintiffs' Appendix, pp. 35-36; Transcript, p. 2.]
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> * * * * *
>
> I conclude that this Court has jurisdiction of the parties and the subject matter of this action, that the plaintiffs have complied with all jurisdictional requisites to a suit under the Federal Tort Claims Act except as to the filing of a timely administrative claim. This, however, does not make the claim of the plaintiff dismissible pursuant to the decision of Honorable Lloyd MacMahon in this action dated September 18th, 1975. In fact, in my mind, it raises an inquiry as to whether if the claim, by reason of what Judge MacMahon referred to as "the government's inexcusable delay, [sic] not sharp practice" shouldn't have been, if that were the case, remanded to the state court for prosecution as it had originally been commenced. It is a question that is not before me at this time, and I don't think it can arise at this time. [Id. at p. 43; Transcript, p. 15.] 5/

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5/ Judge Port is correct in stating that the question of the propriety of a remand to the state court was not raised in this proceeding. See n. 2, p. 4, supra.

Since Judge Port has adopted the rationale and decision of Judge MacMahon with respect to dispensing with the administrative claim requirement, everything that we have hitherto said with respect to Judge MacMahon's decision is equally applicable to Judge Port's decision.

We wish to emphasize that the reference of both judges to "the government's inexcusable delay, [if] not sharp practice" is based upon unwarranted inferences drawn by the plaintiffs in the court below (A. 31-36). Similar inferences are made in Point III of plaintiffs' brief (pp. 16-23) in an effort to show that the government should be estopped from asserting the administrative claim requirement. As we demonstrated in our main brief (pp. 13, 17) the government is not normally subject to estoppel by the acts or omissions of its agents, but even if this were not settled law it cannot seriously be argued that the plaintiffs have made a case for estoppel here. Many of the actions upon which the plaintiffs rely in an effort to show estoppel are those of Travelers Insurance Company and its attorneys in the New York State proceedings (Brief, pp. 18-20, 31-32). Obviously the federal government cannot be held responsible for these actions. However, in their attempt to show that the federal government had knowledge of the litigation prior to the expiration of the two year period of limitation, plaintiffs challenge the affidavit of Mr. William J. Stokes of the Office of the Office of General Counsel of the Department of

Agriculture (Brief, pp. 20-21). Mr. Stokes testified that that Office had no knowledge of the state litigation prior to December 9, 1974 when it was notified by Mr. Sommer, the insurer's attorney (see our main brief, p. 5; A. 19). Plaintiffs point out that in a letter dated December 10, 1974, addressed to plaintiffs' counsel, Mr. Sommer referred to a call and a telegram received by Mr. Hunt as follows:

> Mr. Hunt received a call from Mr. Merwin Kaye of the Research and Operations Division of the Office of General Counsel in Washington, D.C. asking him to send a telegram to the government asking the U. S. Government to defend him pursuant to 28 U.S. Code, Sec. 2679. A telegram to that effect was sent yesterday.
>
> I believe there will be reasonably quick action taken by the government in this matter. [A. 65-66.]

Plaintiffs assert that "[t]his clearly indicates that the United States had knowledge of the action pending in the Courts in New York State against Mr. Hunt before the date indicated by Mr. Stokes" and "the only reasonable inference is that the government knew long before December, 1974 of the existence and status of the action in the Supreme Court of New York and neglected to notify the United States Attorney in the Northern District of New York of that fact" (p. 21). The plaintiffs may be correct in assuming that the date "December 9, 1974" is incorrect by a day or two, since it appears that by December 9 Mr. Hunt had already sent a telegram requesting government representation in response to a call from Mr. Kaye of the

Department of Agriculture's Office of General Counsel (A. 65). On the other hand, Mr. Kaye could have received word of the litigation from Mr. Sommer on December 9 and made a call to Mr. Hunt on the same day, which was immediately acknowledged by Mr. Hunt's telegram. In any event, there is absolutely nothing in this letter nor elsewhere in the record to substantiate the plaintiffs' serious charges that the Office of General Counsel had knowledge of the state litigation prior to December 1974, and deliberately waited for the two year limitation for filing an administrative claim to expire before moving to obtain government representation for Mr. Hunt. Thus there is no foundation for Judge MacMahon's or Judge Port's findings of "inexcusable delay" or "sharp practice" on the government's part.

At the conclusion of their brief (pp. 24-31) plaintiffs attempt to distinguish on their facts numerous cases in which tort claims against the United States have been dismissed for the plaintiffs' failure to file administrative claims. However, their factual distinctions are "distinctions without a difference" insofar as the legal aspect of a failure to file an administrative claim is concerned. Moreover, some of the cited cases are on all fours with the present case in that the plaintiffs therein realized too late that their claims should have been brought in federal courts against the United States and then attempted to raise defenses or waiver or estoppel.

See, e.g., Baker v. United States, 341 F. Supp. 494 (D. Md., 1972), affirmed per curiam C.A. 4 (Addendum to our brief, 8a); Elter v. United States, (W.D. Pa.) (Id. at 16a); Grix v. United States (E.D. Mich.) (Id. at 21a). The crucial difference is that in those cases the district courts, unlike the court below, correctly held that compliance with Section 2675(a) is jurisdictional and not subject to waiver or estoppel.

## CONCLUSION

For the foregoing reasons and those asserted in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

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AUGUST, 1977.

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 1977, I served the foregoing reply brief upon counsel for all parties by causing copies to be mailed, postage prepaid, to:

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# ADDENDUM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SALVATORE LA ROSA,

Plaintiff,

v.

AIMO W. HILL (UNITED STATES OF AMERICA),

Defendant.

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76-C-1080

MEMORANDUM and ORDER

DEC 21 1976

COSTANTINO, D.J.

This action, which arises out of an automobile accident, was originally commenced in state court. Since defendant was a government employee, acting within the scope of his duties, the United States Government removed the action to this court pursuant to the provisions of the Drivers Act, 28 U.S.C. § 2679(c). The government now moves to dismiss since plaintiff never filed an administrative claim with respect to the accident as required by 28 U.S.C. § 2675(a). Plaintiff has cross-moved to remand the case to the state court arguing that defendant Hill and the GEICO insurance company were guilty of laches. This court concludes that the failure to file an administrative claim is a bar to the maintenance of the present action. See, e.g., Meeker v.

United States, 435 F.2d 1219 (8th Cir. 1970); Hoch v. Carter, 242 F. Supp. 863 (S.D.N.Y. 1965). This court, of course, expresses no opinion on any state proceedings which any of the parties herein may subsequently wish to pursue. Accordingly, the motion to dismiss is granted. Plaintiff's cross-motion to remand to the state court is denied.

So ordered.

U. S. D. J.